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No. 92-1348

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAPIDES REGIONAL MEDICAL CENTER, PETITIONER

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

and

ST. FRANCIS CABRINI HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

This case concerns a "sharing arrangement" entered into by a private hospital and a hospital run by the Department of Veterans Affairs under 38 U.S.C. 8153 (Supp. III 1991) for the mutual use of a sophisticated piece of medical equipment. The questions presented are:

1. Whether the court of appeals correctly determined that the sharing arrangement is not subject to the requirements of the Competition in Contracting Act, 41 U.S.C. 253, because it is not a "procurement for property or services" within the meaning of the Act.

2. Whether the court of appeals correctly determined that the sharing arrangement is not subject to the requirements of the Competition in Contracting Act because it was conducted pursuant to "procurement procedures otherwise expressly authorized by statute" within the meaning of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 974 F.2d 565. The opinion of the district court (Pet. App. A23-A27) is reported at 783 F. Supp. 1006.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1992. A petition for rehearing was denied on November 13, 1992. Pet. App. A28-A29. The

petition for a writ of certiorari was filed on February 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Department of Veterans Affairs (VA) is authorized under 38 U.S.C. 8153 (Supp. III 1991) to enter into arrangements with non-VA hospitals for the shared use of specialized medical resources in order to improve VA hospitals, to assure adequate and complete medical care for veterans, and to achieve optimum effective use of specialized medical resources under the VA's control when the VA's immediate needs do not require maximum usage. 38 U.S.C. 8153 (Supp. III 1991); see S. Rep. No. 1727, 89th Cong., 2d Sess. 11 (1966). Under this program, the VA may gain access to the specialized medical resources (including personnel) of a non-VA hospital and may also, under appropriate circumstances, allow outsiders to use specialized medical resources owned by the VA when the VA is not fully utilizing them. The VA has long used its authority under Section 8153 to enter into a wide variety of arrangements for sharing personnel and equipment with non-VA hospitals.

Since 1987, the VA has also used its Section 8153 authority to create arrangements like the one at issue in this case, whereby a VA hospital purchases specialized medical equipment using funds donated in part by a non-VA hospital. These arrangements are undertaken pursuant to the "Advanced Technology Medical Equipment Acquisition and Sharing Program." Congressional committees had encouraged such sharing arrangements in various legislative reports. See S. Rep. No. 129, 99th Cong., 1st Sess. 88-

89 (1985); H.R. Rep. No. 363; 99th Cong., 1st Sess. 22 (1985).

The sharing program plays an important role in allowing the VA optimum access to specialized medical equipment for the treatment of veterans. As the congressional reports noted, "[t]he establishment of this new mechanism * * * help[s] the VA to acquire costly, advanced state-of-the-art medical equipment more easily and * * * provide[s] a means of using that equipment to maximum effectiveness by encouraging long-term sharing with community institutions." S. Rep. No. 129, *supra*, at 89. By arranging for non-VA hospitals to pay 50 percent of the cost of such equipment, the VA virtually doubles the purchasing power of its budget.

2. The VA operates the Alexandria Veterans Affairs Medical Center in Rapides Parish, Louisiana. Pet. App. A2. Some cancer patients there require radiation therapy, which often entails the use of a sophisticated medical device known as a linear accelerator. Lacking a linear accelerator of its own, the VA hospital had contracted for radiation services with petitioner, which owned the only high-energy linear accelerator in the area. Pet. App. A2 n.2. By late 1989, the VA thought that petitioner was charging too much for radiation services. Accordingly, the VA began to explore ways of developing an alternative source of these services. *Ibid.*

VA officials learned that another hospital in Rapides Parish, respondent St. Francis Cabrini Hospital (Cabrini), was planning to acquire a linear accelerator. Pet. App. A2 n.2. In December 1989, the VA began discussing with Cabrini the possibility of participating in the VA's sharing program. These

discussions resulted in an August 1990 "Memorandum of Understanding" between the VA and Cabrini, which provided: (1) that the VA and Cabrini would each advance half the cost of a linear accelerator (about $750,000 each); (2) that the VA would acquire an accelerator, following all applicable procurement laws; (3) that the accelerator would be wholly owned by the VA; (4) that the VA would allow the accelerator's installation at Cabrini in space that Cabrini would provide at its own expense; and (5) that the use of the accelerator would be governed by an agreement which the VA and Cabrini would execute at a later date. Pet. App. A24, A34-A35.

3. Early in 1990, petitioner learned of the discussions that the VA and Cabrini were having and endeavored to block the sharing agreement. Hospital officials wrote numerous letters to officials at the VA, to members of Congress, and to the President, arguing that the acquisition of another accelerator in Rapides Parish would be duplicative and unnecessary and would drive up the cost of medical care. Pet. App. A2, A12 n.12.

On January 29, 1991, petitioner also filed a protest regarding the VA-Cabrini plan with the Comptroller General. Petitioner claimed that the VA's actions violated the requirements of the Competition in Contracting Act (CICA), 41 U.S.C. 253. The Comptroller General dismissed the protest as untimely, noting that the applicable regulations require a protest to be filed within ten working days after the basis for the protest is known. *Rapides Regional Medical Center*, No. B-242601, 91-1 C.P.D. ¶ 159 (Feb. 12, 1991).

Petitioner sought reconsideration of its protest. The Comptroller General denied the request for reconsideration. In addition to reaffirming the finding that the protest was untimely, the Comptroller General noted that sharing agreements negotiated under 38 U.S.C. 8153 (Supp. III 1991) are not subject to the competition requirements of the CICA, because they are "otherwise expressly authorized by statute," within the meaning of 41 U.S.C. 253. *Rapides Regional Medical Center—Reconsideration*, No. B-242601.2, 91-1 C.P.D. ¶ 614 (June 28, 1991).

4. a. Petitioner filed suit against the VA in the United States District Court for the Western District of Louisiana on July 29, 1991. Petitioner alleged that the VA-Cabrini plan violated the competition requirements of the CICA. Cabrini later intervened as a party defendant. Pet. App. A3. The district court held that the CICA had been violated and issued a permanent injunction against the implementation of the VA-Cabrini agreement. Pet. App. A26.

b. The VA and Cabrini both appealed. A unanimous panel of the Fifth Circuit reversed the judgment and vacated the injunction. Pet. App. A22. The court held that the arrangement between the VA and Cabrini was not a "procurement" within the meaning of the CICA because it did not involve the government's paying money (or granting some other benefit) in return for the receipt of property or services. Rather, it involved granting the right to use government property. Hence, the transaction was more analogous to a lease or sale of government property than to a procurement by the government.

Pet. App. A13-A19. The CICA does not govern sales or leases of government property. Pet. App. A13 n.15.

Even assuming that the challenged arrangement constituted a "procurement" within the meaning of the CICA, the court held that sharing arrangements entered into under 38 U.S.C. 8153 (Supp. III 1991) are not subject to the CICA because they are "otherwise expressly authorized by statute." Pet. App. A19. The court noted that Section 8153 provides for administrators at the two hospitals concerned to work out an appropriate reimbursement rate for the use of the shared equipment, a procedure that is inconsistent with the competition requirements of the CICA. Pet. App. A20. The court also noted that the VA and the Comptroller General have approved the practice of negotiating sharing arrangements under Section 8153 without competitive bidding. Pet. App. A20-A21, A21 n.24.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The VA-Cabrini sharing arrangement is not subject to the CICA because it is not a "procurement" within the meaning of the Act. As the court noted, the term "procurement," although not defined in the statute, is generally understood to refer to the process by which the government pays out money (or confers some other benefit) in return for the receipt of property or services. Under the arrangement challenged here, the government received money and in return granted a private party the right to use

government property. Accordingly, as the court held, the arrangement is closely analogous to a lease or sale of government property, not to a procurement of property or services by the government.

The CICA does not regulate leases or sales of government property. See, *e.g.*, *Crystal Cruises, Inc.*, No. B-238347, 90-1 C.P.D. ¶ 141 (Feb. 1, 1990) (granting of national park concession permit not a procurement); *Columbia Communications Corp.*, No. B-236904, 89-2 C.P.D. ¶ 242 (Sept. 18, 1989) (lease of right to use government satellite not a procurement); *Jefferson Bank & Trust*, No. B-228563, 87-2 C.P.D. ¶ 390 (Oct. 23, 1987) (leasing of government-owned office space not a procurement); *Surface Alloys Corp.*, No. B-222703, 86-2 C.P.D. ¶ 7 (June 25, 1986) (Navy's provision of sophisticated piece of scientific equipment to government contractor not a procurement). That is not to say, of course, that leases or sales of government property are entirely unregulated; they are simply not regulated by the CICA.

Petitioner mischaracterizes the VA-Cabrini agreement as a procurement by focusing on something it does not contain: an agreement for Cabrini to provide radiation therapy *services* to VA patients. Pet. 1-2, 26-27. The challenged agreement provides only that the VA will purchase an accelerator, and that in return for donating funds Cabrini will have access to the use of the accelerator. It does not provide that Cabrini will furnish radiation therapy services to the VA. The actual procurement in this case was of the linear accelerator from its manufacturer. That procurement complied with all applicable laws, and petitioner does not suggest otherwise.

2. Even were the sharing arrangement a "procurement," the competition requirements of the CICA would not apply, because the procurement was undertaken pursuant to procurement procedures "otherwise expressly authorized by statute." 41 U.S.C. 253. The court of appeals correctly held that VA sharing arrangements under 38 U.S.C. 8153 (Supp. III 1991) would fall within this exception to the CICA.

a. Section 8153 authorizes the VA to enter into arrangements with non-VA hospitals for the shared use of personnel or equipment. The VA has made extensive use of this authority during the 27 years of Section 8153's existence, forming close working relationships between VA and other hospitals. During this time, the sharing program has proceeded on a noncompetitive basis, with factors such as the maintenance of cooperative relationships taking precedence over pure cost considerations. If petitioner's argument were correct, it would disrupt not only arrangements such as the one at issue here, involving the acquisition of new equipment, but also arrangements between VA and private hospitals for the shared use of existing equipment or personnel, which have proceeded without controversy on a noncompetitive basis for nearly three decades.

The historical practice of negotiating sharing arrangements noncompetitively is authorized by Section 8153, and in particular by Section 8153(b). The statute grants very broad discretion to the Secretary of Veterans Affairs, permitting a sharing arrangement "when the Secretary determines it to be in the best interest of the prevailing standards of the Department medical care program." 38 U.S.C. 8153

(Supp. III 1991). Section 8153(b) states that sharing arrangements will provide for reciprocal reimbursement between the hospitals concerned for the use of shared resources. But the statute does not provide that the reim-bursement rates will be determined by competition. Instead, it states that the reimbursements shall be

> based on a methodology that provides *appropriate flexibility to the heads of the facilities concerned to establish an appropriate reimbursement rate* after taking into account local conditions and needs and the actual costs to the providing facility of the resource involved.

38 U.S.C. 8153(b) (Supp. III 1991) (emphasis added).

As the court of appeals held, that statutory provision is inconsistent with the theory that, in entering into a sharing arrangement, the Secretary must attempt to achieve the greatest possible reimbursement to the VA by using competitive bidding. Pet. App. A20. When the VA allows a non-VA hospital to use its resources, the reimbursement it receives must plainly be determined by "the heads of the facilities concerned" under a method that allows them "appropriate flexibility." 38 U.S.C. 8153(b) (Supp. III 1991). The reimbursement will be determined by a procedure of negotiation between the heads of the facilities concerned, not by competitive bidding procedures. Noncompetitive procedures are therefore "otherwise expressly authorized by statute" within the meaning of 41 U.S.C. 253.[1]

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[1] The court of appeals properly noted that other indicators of congressional intent confirm that Section 8153 authorizes VA

b. To the extent that there is any ambiguity in 38 U.S.C. 8153, the matter should be resolved by deferring to the opinion of the VA and the Comptroller General. The VA has by regulation expressed its view that Section 8153 authorizes sharing arrangements to proceed noncompetitively. See 48 C.F.R. 806.302-5(b). As the court of appeals held, this interpretation of the statute by the agency charged with its administration is a reasonable one. Pet App. A21. It therefore is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioner mistakenly characterizes the regulation as the VA's attempt to exempt itself from the CICA. Pet. 4, 21. The regulation is not itself the authority that exempts sharing arrangements from the CICA, but rather it is the VA's reasonable interpretation of Section 8153, which is the statute that satisfies the CICA's exception for procurement procedures that are "otherwise expressly authorized by statute." 41 U.S.C. 253.

In addition, the Comptroller General, both before and after passage of the CICA, has expressly recognized that the VA is authorized to enter into Section 8153 sharing arrangements on a noncompetitive basis. In *Veterans Administration*, No. B-195559.2, 81-2 C.P.D. ¶ 369 (Nov. 2, 1981), the Comptroller General held that sharing arrangements were properly negotiated without adherence to pre-CICA

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sharing arrangements to proceed noncompetitively. See, *e.g.*, Pet. App. A19-A20 (reporting requirement). But the main and sufficient indicator of Congress's intent is the language of Section 8153.

competition procedures. More recently, in this case, the Comptroller General confirmed that sharing arrangements under Section 8153 are exempt from the CICA because they are "otherwise expressly authorized by statute." *Rapides Regional Medical Center—Reconsideration*, No. B-242601.2, 91-1 C.P.D. ¶ 614 (June 28, 1991) ("[t]he Competition in Contracting Act of 1984 * * * specifically exempts from full and open competition procurement procedures otherwise expressly authorized by statute, such as here").

The courts of appeals have held that the Comptroller General's expertise in the highly technical field of government procurement makes his opinion worthy of considerable weight. See *Shoals American Industries, Inc.* v. *United States*, 877 F.2d 883, 888-889 (11th Cir. 1989); *B.K. Instrument, Inc.* v. *United States*, 715 F.2d 713, 729-730 (2d Cir. 1983); *J.H. Rutter Rex Mfg. Co.* v. *United States*, 706 F.2d 702, 711 (5th Cir.), cert. denied, 464 U.S. 1008 (1983); *Kinnett Dairies, Inc.* v. *Farrow*, 580 F.2d 1260, 1271 (5th Cir. 1978) (quoting *Hayes Int'l Corp.* v. *McLucas*, 509 F.2d 247, 258 (5th Cir.), cert. denied, 423 U.S. 864 (1975)); *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1298-1301 (D.C. Cir. 1971). Where, as here, the Comptroller General and the executive agency involved agree that a transaction is proper, courts should be hesitant to intervene. *Kinnett Dairies*, 580 F.2d at 1272.

There is no conflict in the circuits on this issue. Petitioner cites no case that supports its view that VA sharing arrangements are subject to CICA competition requirements. Petitioner erroneously compares this case to *Andrus* v. *Glover Construction Co.*,

446 U.S. 608 (1980). In that pre-CICA case, the government, in awarding a road construction contract, had relied on the exception to pre-CICA competition requirements that allowed procurement to proceed by means other than advertising when such means were "otherwise authorized by law." See *id.* at 615 (quoting 41 U.S.C. 252(c)(15)). The Court noted, however, that a specific provision of the pre-CICA statute made the "otherwise authorized by law" exception inapplicable to road construction contracts, 446 U.S. at 615, and so that exception could not validate the contract at issue.

Glover Construction is plainly inapposite here. This case concerns the exception to the CICA for procurement procedures "otherwise expressly authorized by statute." 41 U.S.C. 253. In contrast to *Glover Construction*, no other part of the CICA makes that exception inapplicable to this case. The court of appeals properly found that 38 U.S.C. 8153 (Supp. III 1991) provides the necessary statutory authorization for the VA's sharing program to be conducted on a noncompetitive basis.[2]

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[2] Petitioner also alleges a conflict between the court of appeals' opinion and the opinion of this Court in *Ex parte Endo*, 323 U.S. 283 (1944), with regard to the effect to be given to appropriations legislation. But the court of appeals did not hold that appropriations legislation is the source of the VA's exemption from CICA; it merely referred to an appropriations bill as something that helped to explain the VA's regulations. See Pet. App. A21. In any event, the court's reference to appropriations legislation is no more than a mere detail in its opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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